

January 27, 2006

PINELANDS COMMISSION

Pinelands Comprehensive Management Plan

Standards for Certification; Height Limitations; Municipal Reserve Areas; Landfills; Surface Water Runoff; Pilot Program for Alternate Design Wastewater Treatment Systems

Adopted Amendments: N.J.A.C. 7:50-3.39, 4.2, 5.27, 5.28, 5.32, 5.62, 5.63, 6.75, 6.84 and 10.22

Proposed: November 7, 2005 at 37 N.J.R. 4133(a)

Adopted: February 10, 2006 by the New Jersey Pinelands Commission,
John C. Stokes, Executive Director

Filed: April 6, 2006 **with technical changes** not requiring additional public notice
and **with proposed amendments at N.J.A.C. 7:50-5.4(c) not adopted at this time.**

Authorized by: New Jersey Pinelands Commission.

Authority: N.J.S.A. 13:18A-6j.

Effective Date: May 1, 2006

Expiration Date: Exempt.

Summary of Public Comments and Agency Responses:

The New Jersey Pinelands Commission (Commission) is adopting amendments to subchapters 3, Certification of County, Municipal and Federal Installation Plans, 4, Development Review, 5, Minimum Standards for Land Uses

and Intensities, 6, Management Programs and Minimum Standards, and 10, Pilot Programs, of the Pinelands Comprehensive Management Plan (CMP). The amendments were proposed on November 7, 2005 at 37 N.J.R. 4133(a). The adopted amendments relate to municipal reserves, stormwater management, Pinelands Development Credit obligations for certain lot size variances, expansion of the Cape May County landfill and the Commission's pilot program for alternate design wastewater treatment systems.

In association with publication of the proposed amendments in the November 7, 2005 issue of the New Jersey Register, the Pinelands Commission transmitted the proposal to each Pinelands municipality and county, as well as to other interested parties, for review and comment. Additionally, the Pinelands Commission:

- Sent notice of the public hearing to all persons and organizations which subscribe to the Commission's public hearing registry;
- Placed advertisements of the public hearing in the five official newspapers of the Commission, as well as on the Commission's own web page;
- Submitted the proposed amendments and new rules to the Pinelands Municipal Council pursuant to N.J.S.A. 13:18A-7f;
- Distributed the proposed amendments to the news media maintaining a press office in the State House Complex;
- Published a copy of the proposed amendments on its web page at www.nj.gov/pinelands; and

- Distributed press releases concerning the proposed amendments and new rules to the news media

A formal public hearing was held before the Commission staff on December 7, 2005. Approximately 10 people attended the hearing; oral testimony on the rule proposal was provided by three individuals. The hearing officer's recommendations are in accordance with the public comment and agency responses and agency-initiated changes below.

Oral comments were recorded on magnetic tape which is on file at the Commission's office at 15 Springfield Road, New Lisbon, New Jersey. The record of this rulemaking is available for inspection in accordance with applicable law by contacting:

Betsy Piner
 Pinelands Commission
 P.O. Box 7
 New Lisbon, NJ 08064.

Summary of Public Comments and Agency Responses:

The Commission accepted written comments by regular mail, facsimile or e-mail on the November 7, 2005 proposal through January 6, 2006.

The following persons submitted written comments (an asterisk indicates those persons who submitted oral comments as well):

1. Babinski, Judith Ann; Pitney Hardin LLP, Cingular Wireless*
2. Griffith, Cindy; City Clerk, City of Ocean City

3. Harkins, Joanne M.; Director of Land Use and Planning, New Jersey Builders Association.
4. Kammer, Claudia R.; Township Clerk, Lower Township
5. McGlinchey, Edward J., Secretary, Pinelands Municipal Council
6. Norkis, Charles M., Executive Director, Cape May County Municipal Utilities Authority
7. Sachau, B.
8. Scelsi, Paula; Supervising Environmental Specialist, New Jersey Department of Transportation, Division of Environmental Resources
9. Stefankiewicz, Lisa; Borough Clerk, Borough of West Cape May
10. Stilwell, Warren; Czura Stilwell LLC, Cingular Wireless*
11. Zublatt, Alan B.; Verizon Wireless and Sprint Nextel Corporation*

The Commission's response to the comments is set forth below.

1. **COMMENT:** General support for all of the proposed amendments was submitted by one party. (5).

RESPONSE: The Commission appreciates the support of this party.

2. **COMMENT:** Three parties objected to the proposed amendments at N.J.A.C. 7:50-5.4.(c) relative to local communications facilities on the basis that they were characterized in the rule proposal as mere clarifications when in fact some of them represent significant departures from current CMP requirements. These parties further asserted that the proposed amendments represent a violation

of the federal Telecommunications Act and the Wireless Communication and Public Safety Act of 1999. These parties cited numerous other and more specific objections to the proposed amendments. One of the parties submitted an alternative set of local communications facilities regulations for the Commission's consideration. All of the parties asked the Commission not to proceed with adoption of the proposed amendments at this time but to table the amendments and engage in discussions with the parties with the goal of developing a different and mutually acceptable approach. (1, 10, 11)

RESPONSE: While not in agreement with many of the contentions of these parties, particularly the assertion that the amendments violate the Telecommunications Act and Wireless Communication and Public Safety Act, the Commission does recognize the importance of affording adequate time and effort to address the issues raised by these parties, as well as the benefits which might result from a more comprehensive analysis of the Commission's local communications facility regulations. Therefore, the Commission is making no changes to the Comprehensive Management Plan related to local communications facilities at this time. Instead, the Commission will review the alternate approach suggested by one of the parties and discuss it with interested providers. The results of that effort will determine whether a comprehensive set of amendments to the Comprehensive Management Plan relative to local communications facilities will be proposed in the future or whether the Commission will need to consider proceeding with adoption of the previously proposed amendments.

3. **COMMENT:** One individual stated that the proposed amendments relative to local communications facilities at N.J.A.C. 7:50-5.4(c) should take into account the impacts of cellular towers on birds and wildlife. (7)

RESPONSE: Local communications facilities and all other development in the Pinelands Area must adhere to the environmental standards of the CMP, including those related to the protection of rare plants and animals and their habitats. The proposed amendments do not change that requirement.

4. **COMMENT:** One party stated that N.J.A.C. 7:50- 5.62(b)1 should be amended by increasing the required size for a municipal reserve area from a minimum of 50 acres to several hundred acres. This party suggested that 50 acres is too small to be considered a reserve area. (3)

RESPONSE: One of the Commission's goals in revising the criteria for designation of municipal reserve areas at N.J.A.C. 7:50-5.62(b) was to increase the likelihood that this important planning tool would be utilized by Pinelands municipalities by providing greater flexibility. Although the 50 acre minimum requirement may lead to the establishment of relatively small reserve areas, the Commission believes that there may well be situations where this is wholly appropriate. The designation of a small reserve area within a Regional Growth Area that is adjacent to a conservation-oriented management area or other environmentally sensitive lands is just one example. The Commission, therefore, does not agree that N.J.A.C. 7:50-5.62(b)1 should be amended to increase the minimum size of a municipal reserve area.

It is important to note that the designation of a municipal reserve area will require the municipal adoption of an implementing ordinance and submission of that ordinance to the Commission for review. The Commission has an obligation to review any such ordinance for consistency with the CMP, including all of the standards set forth in N.J.A.C. 7:50-5.62(b). If a municipality attempts to designate lands within its Regional Growth Area as a reserve area in a manner which is inappropriate or inconsistent with the CMP, either due to the size of the reserve area or other factors, the municipal ordinance will not be certified by the Commission.

5. **COMMENT:** One individual objected to the proposed amendments at N.J.A.C. 7:50-5.27(c), 5.28(a)4 and 5.32(b)3, stating that the Commission should not take steps to reduce the costs of waivers because such costs help to stop runaway development. This individual further stated that the number of waivers approved to date by the Commission only indicates that the Commission is a pushover for development. (7)

RESPONSE: As was emphasized in the rule proposal, the amendments being made to N.J.A.C. 7:50-5.27(c), 5.28(a)4 and 5.32(b)3 in no way alter CMP standards for the establishment of extraordinary hardships or granting of waivers of strict compliance. The establishment of such a hardship will remain a requirement for the Commission's approval of any waiver of strict compliance that does not involve a compelling public need. Neither do the amendments relax the limitations contained in N.J.A.C. 7:50-4.65 which govern how much relief from

CMP standards may be granted by the Commission in its approval of any waiver. The amendment merely reduces the number of PDCs that must be purchased in association with certain municipal lot size variances which are associated with properties which also require waivers of strict compliance. Such a reduction in no way represents a loosening of development restrictions in any Pinelands management area.

The rule proposal indicated that of the 80 waivers of strict compliance approved by the Commission between 1999 and July of 2005, only five involved applications to which the proposed amendments would have been applicable. The Commission has no reason to believe the amendments will lead to any significant increase in this type of application or in requests for waivers of strict compliance in general. Nevertheless, the Commission intends to monitor the situation on an annual basis. If the number of applications to which the amendments apply significantly increases, the Commission may consider additional amendments to the CMP.

6. **COMMENT:** Support for the proposed amendments to N.J.A.C. 7:50-6.75(i) concerning the Cape May Landfill was expressed by four parties, all of whom indicated that the amendments are appropriate because they will facilitate continuation and expansion of the landfill in a manner which will not impair public health, safety or welfare, thereby providing a safe, convenient and affordable disposal option for Cape May County residents and businesses and sustained

financial support for recycling operations and services offered by the Cape May County Municipal Utilities Authority. (2, 4, 6, 9)

RESPONSE: The Commission appreciates the support of these parties.

7. **COMMENT:** One party objected to the proposed amendments to N.J.A.C. 7:50-6.75(i), stating that the Commission should ban the continuation of the Cape May Landfill entirely. (7)

RESPONSE: The Commission disagrees. The proposed amendments authorize the continued operation and expansion of a state of the art facility, one in which significant public investment has been made. This facility serves as the only realistic alternative for waste disposal in Cape May County. All landfill activities authorized by the amendments will occur on previously disturbed lands. Deed restrictions against any future landfill expansion will be required. In short, the amendments are limited in applicability to the continued operation of only one existing facility, no precedent is being set and any negative environmental impacts which may result will likewise be limited.

8. **COMMENT:** One party stated general support for the Commission's attempt to integrate the New Jersey Department of Environmental Protection's stormwater management requirements with those of the CMP at N.J.A.C. 7:50-6.84(a)6 but requested a meeting with Commission staff in order to clarify how the new rules will apply to public projects, particularly those road and bridge projects undertaken by the Department of Transportation. This party also indicated that there were issues warranting discussion with some of the proposed amendments,

including the prohibition on discharge of stormwater to waterbodies, use of nonstructural stormwater measures and those stormwater management requirements which will apply within high pollutant loading areas. (8)

RESPONSE: All public development in the Pinelands Area requires the direct approval of the Pinelands Commission and is subject to the minimum environmental standards of subchapter 6 of the Comprehensive Management Plan, including those related to stormwater management. As requested, the Commission's staff will be meeting with the commenter and any other state agency or department concerned with the new stormwater rules to discuss application processes, the applicability of the exemption provisions set forth at N.J.A.C. 7:50-6.84(a)6vi to public projects and any other areas of potential concern.

9. **COMMENT:** One party raised a number of questions and concerns with the proposed requirements for stormwater maintenance at N.J.A.C. 7:50-6.84(a)6vii. Among these was a question as to the relationship of the CMP's stormwater maintenance requirements to the general maintenance guarantee requirements contained in the Municipal Land Use Law. This party also questioned the Commission's intent in referring to maintenance guarantees in N.J.A.C. 7:50-6.84(a)6vii(3)(A) and objected to the use of homeowners associations in 6vii(3)(B) and prepayment of fees in 6vii(3)(C) as reasonable methods for ensuring long-term maintenance of stormwater management systems. It was suggested that because stormwater systems are part of the public infrastructure, their long-term management should be a municipal responsibility. (3)

RESPONSE: The stormwater maintenance standards being adopted at N.J.A.C. 7:50-6.84(a)6vii require the submission of maintenance plans which must detail measures related to inspection, maintenance, repair and replacement of stormwater management systems. An adequate means of ensuring the permanent financing of the measures identified in these plans must be specified pursuant to N.J.A.C. 7:50-6.84(a)6vii(3). Examples of financing methods are set forth in subsections (3)(A)-(B). These maintenance requirements were not intended to modify or take the place of the maintenance guarantee requirements established in the Municipal Land Use Law (N.J.S.A. 40:55D-53). Municipalities will continue to have the ability to require two-year maintenance guarantees for all improvements, including stormwater management facilities. To avoid any further confusion on the part of municipalities or applicants, N.J.A.C. 7:50-6.84(a)6vii(3)(A), which had listed the applicant's provision of "maintenance guarantees" as a potential method for permanent financing of a maintenance plan, is being deleted. Upon further review, the Commission feels this particular section was redundant with (B) and (C) and confusing in its use of a similar term as that in the Municipal Land Use Law language.

The concerns raised relative to the establishment of homeowners associations and requirement for prepayment of stormwater fees are acknowledged. The establishment of a homeowners association may be an appropriate means of ensuring permanent financing of a stormwater maintenance plan for a large residential subdivision but not for a smaller residential

development. Homeowners associations in general may be viewed favorably by some Pinelands municipalities and not by others. Likewise, the establishment of municipal stormwater funds and/or the municipal assumption of maintenance responsibilities may be a viable option in some municipalities but not in others. The intent of N.J.A.C. 7:50-6.84(a)6vii(3) was merely to provide examples of funding mechanisms. No particular mechanism is mandated by the CMP; each Pinelands municipality will be asked to decide what mechanism or mechanisms would be most appropriate and implement those choices through adoption of an ordinance amendment. All such implementing ordinances will require review by the Commission and will be approved only if they ensure permanent financing of stormwater maintenance in an appropriate and realistic manner. As an example, ordinances which require the prepayment of fees will need to make clear that the collected funds will be dedicated to stormwater maintenance. In addition, such fees will need to be established by ordinance and reasonably related to what the municipality projects to be the cost of ongoing maintenance activities and necessary structural replacements in the future.

10. **COMMENT:** One party expressed support for the amendment being made at N.J.A.C. 7:50-10.22(a)6i relative to the Commission's Pilot Program for Alternate Design Wastewater Treatment Systems. (3)

RESPONSE: The change to N.J.A.C. 7:50-10.22(a)6i resulted from an amendment petition filed by the commenter last year. The Commission appreciates the expression of support for the amendment.

Summary of Agency-Initiated Changes:

The Commission is making changes to the proposed amendments at N.J.A.C. 7:50-6.84(a)6ii(4), 6.84(a)6iii(2) and 6.84(a)6iii(2)(C)(III) for purposes of clarification. N.J.A.C. 7:50-6.84(a)6ii(4) is being amended to clarify that direct discharge of stormwater runoff to wetlands and wetlands transition areas is not permitted. Previously, the regulation referred only to surface water bodies. By definition, wetlands in the Pinelands include surface water bodies. Further, this revision is intended to clarify existing regulation which prohibits stormwater discharges and other development within wetlands and wetlands transition areas in the Pinelands (N.J.A.C. 7:50-6.6). N.J.A.C. 7:50-6.84(a)6iii(2) is being clarified through the addition of a reference to the Department of Environmental Protection's stormwater management rules so that the meaning of the terms "high pollutant loading areas" and "areas where stormwater runoff is exposed to source material" will be better understood. Finally, N.J.A.C. 7:50-6.84(a)6iii(2)(C)(III), which suggests the use of wet ponds as a pretreatment measure, is being revised in order to clarify that such ponds must be hydraulically disconnected from the seasonal high water table. These are technical changes being made for purposes of clarification only, with no change of substance involved.

Federal Standards Statement

Section 502 of the National Parks and Recreation Act of 1978 (16 U.S.C. §471i) called upon the State of New Jersey to develop a comprehensive management plan for the Pinelands National Reserve. The original plan adopted in

1980 was subject to the approval of the United States Secretary of the Interior, as are all amendments to the plan.

The Federal Pinelands legislation sets forth rigorous goals which the plan must meet, including the protection, preservation and enhancement of the land and water resources of the Pinelands. The adopted amendments were designed to meet those goals by establishing revised standards for the creation of municipal reserves in order to make this a more useful tool for managing growth and providing for enhanced stormwater management.

With respect to stormwater management, the Federal Clean Water Act (33 U.S.C. §§ 251 et seq.) regulates stormwater runoff and nonpoint source pollution control. The Federal Clean Water Act requires permits under Section 402 of that Act (33 U.S.C. §1342) for certain stormwater discharges. Section 319 of the Clean Water Act (33 U.S.C. § 1329) authorizes a Federal grant-in-aid program to encourage states to control nonpoint sources. The Commission's newly adopted regulations were designed to control stormwater and minimize nonpoint source pollution and are fully consistent with the Federal requirements.

There are no other Federal requirements which apply to the subject matter of these amendments.

Full text of the adopted amendments follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks “[thus]”):

7:50-6.84 Minimum standards for point and non-point source discharges

- (a) The following point and non-point sources may be permitted in the Pinelands:
 - 1.-5. (No change.)
 - 6. Surface water runoff in accordance with N.J.A.C. 7:8, subchapters 5 and 6, as amended, except as modified and supplemented pursuant to the following:
 - i. (No change.)
 - ii. Runoff shall meet the requirements in (4) and (5) below and one of (1), (2) or (3) below:
 - (1)-(3) (No change.)
 - (4) There shall be no direct discharge of stormwater runoff from any point or nonpoint source to any ***wetland, wetlands transition area or*** surface waterbody. In addition, stormwater runoff shall not be directed in such a way as to increase the volume and rate of discharge into any surface water body from that which existed prior to development of the parcel; and

(5) (No change.)

iii. Recharge standards:

(1) (No change.)

(2) In high pollutant loading areas (HPLA) and areas where stormwater runoff is exposed to source material, ***as defined at N.J.A.C. 7:8-5.4(a)2iii(1) and (2),*** the following additional water quality standards shall apply:

(A)-(B) (No change.)

(C) The stormwater runoff from HPLAs and areas where stormwater runoff is exposed to source material shall be subject to pretreatment to achieve 90 percent removal of total suspended solids from the water quality design storm established in N.J.A.C. 7:8-5.5(a) prior to infiltration, using one or more of the following measures, designed in accordance with the New Jersey Stormwater Best Management Practices Manual developed by the New Jersey Department of Environmental Protection, dated February 2004, as amended:

(I)-(II) (No change.)

(III) Wet pond*s, **which shall be hydraulically disconnected by a minimum of two feet of vertical separation from the seasonal high water table and shall be*** designed to achieve a minimum 80 percent removal of total suspended solids;

(IV)-(V) (No change.)

(D) (No change.)

iv.-vi. (No change.)

vii. Maintenance standards:

(1)-(2) (No change.)

(3) An adequate means of ensuring permanent financing of the inspection, maintenance, repair and replacement plan shall be implemented and shall be detailed in the maintenance plan. Financing methods shall include but not be limited to:

[(A) For private development applications, the provision of maintenance guarantees for the entire stormwater management system;]

(A)**[(B)] The assumption of the inspection and maintenance program by a municipality, county, public utility or homeowners association; or

(B)**[(C)] The required payment of fees to a municipal stormwater fund in an amount equivalent to the cost of both ongoing maintenance activities and necessary structural replacements.

viii. (No change.)